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In The Supreme Court of the United States

ENGINE MANUFACTURERS ASSOCIATION AND WESTERN STATES PETROLEUM ASSOCIATION,

Petitioners,

v.

SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICUS CURIAE* OF THE STATE OF CALIFORNIA IN SUPPORT OF SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT

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QUESTION PRESENTED

Does the Clean Air Act preempt local regulation of specialized vehicle fleets, most of them government-owned, requiring that fleet operators who replenish or expand their fleets must purchase clean-fuel vehicles that are already California-certified under the Act if such vehicles are commercially available, where manufacturers are not required to produce or sell any particular vehicle?

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INTRODUCTION AND SUMMARY OF ARGUMENT

Amici States,[1] drawn from across the country, contain approximately 160 million people, or over half of the total population of this nation.[2] To protect the health of their residents and the strength of their economies, States need to be able to use the most varied and effective tools, including market-based requirements, to attack some of the worst air pollution problems in the nation and, indeed, in the world. Tens of millions of *amici* States' residents live in air basins that exceed the health-based National Ambient Air Quality Standards that Congress has ordered the States to meet. In several of the *amici* States, pollutant emissions from vehicles either compete with or have replaced emissions from stationary sources, such as factories and refineries, as the largest contributors to air pollution. Vehicle emissions are often the most dangerous to public health. For example, in the greater Los Angeles area covered by Respondent South Coast Air Quality Management District ("SCAQMD"), approximately 70% of the cancer risk posed by air pollution comes from air contaminants emitted by diesel vehicles.[3]

To reduce this serious cancer risk to the millions of people who live and work in the South Coast Air Basin,

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[1] The Attorneys General file on behalf of their respective States, pursuant to Rule 37.4. The Pennsylvania Department of Environmental Protection files pursuant to the consent filed by the parties to this case, consenting under Rule 37.2(a) to the filing of all timely *amicus curiae* briefs.

[2] Figures come from the 2000 census, as reported at the Census Bureau website, www.census.gov.

[3] South Coast Air Quality Management District, *Multiple Air Toxics Exposure Study in the South Coast Air Basin (MATES-II)*, March 2000, p. ES-3.

the SCAQMD adopted the Fleet Rules at issue here. The Fleet Rules require owners of fleets of specified vehicle types (*e.g.* buses, airport shuttles), when they replenish or expand those fleets, to choose from among the cleanest vehicles commercially available to them, and to buy clean-fueled, non-diesel vehicles if such non-diesels are commercially available. If no qualified clean-fuel vehicle is certified, the fleet owner may buy a CARB-certified diesel vehicle.

No requirement is placed upon any manufacturer to build, certify or offer any particular vehicle for sale. In the Clean Air Act, Congress expressed its intent that manufacturers be required to build no more than two versions – a federal and a California version – of any particular model vehicle; no "third car" could be required. The Fleet Rules comply with this intent; no "third car" can possibly be required by the Fleet Rules, since those Rules only require the purchase of vehicles that are already CARB-certified.

Respondent's Fleet Rules may change the market share of various manufacturers. However, the Act does not mandate a "buy-from-the-bottom" requirement on States or localities, that they provide a guaranteed market for vehicles whose emissions increase cancer and other serious health risks.

The Clean Air Act ("CAA" or "Act") places the primary responsibility for meeting the health-based national ambient air quality standards squarely on the States, and imposes heavy penalties if States fail. The cooperative federalism embodied in the Clean Air Act has always allowed the States to use a wide range of tools to control both stationary and vehicular air pollution. The Fleet Rules are an attempt to use a tool beyond traditional mechanical, tailpipe pollution reduction devices. The Fleet Rules do not directly apply to vehicle manufacturers at all,

but instead set limits on what a fairly limited number of purchasers of specialized fleet vehicles may buy, rather than on what manufacturers must produce. They are what might be called "demand-side" regulations, rather than "supply-side" regulations.

The Fleet Rules are presumed valid and not preempted, because the field of air pollution control in general is an area of traditional state regulation, and motor vehicle emissions in particular is an area where the States regulated for years before there was any federal presence.

In enacting the Clean Air Act, Congress did not intend to preempt the Fleet Rules, either by express or implied preemption. The Fleet Rules are not expressly preempted because they are not actual emissions "standards", i.e., the numeric limits on emissions that set production mandates for manufacturers to which Congress referred in Section 209(a). Textual analysis of Section 209, of the Act's fuel content provisions, and of the transportation and market incentive provisions that can be required in nonattainment areas shows that the preemption of emissions control standards in Section 209(a) is a narrow one that encompasses only such production mandates, and not all regulations intended to reduce motor vehicle emissions.

Many States and urban areas have vehicle-caused air pollution problems that demand regulatory solutions that go beyond the reach of tailpipe "standards." As an example, New Yorkers drove over 125,000,000,000 miles in 1996, creating formidable air pollution problems. To meet them, New York has adopted California's standards, and may consider rules such as the Fleet Rules in the future. Both New York State and New York City restrict motor vehicle engine idling as a means of reducing air pollution in the areas where the most people are exposed to it, and

need to exercise their retained authority to control vehicle pollution, in order to protect the health of their residents.

Nor are the Fleet Rules subject to implied preemption. The Act has never fully preempted the field of motor vehicle emission control, and Congress did not intend to occupy the entire field of motor vehicle emission control by enacting Section 209. It has always granted to California, and to other States that adopt California's emissions control standards, the right to regulate vehicle emissions almost co-equally with the federal government. Further, the savings clause of Section 116 of the Act makes clear that only certain motor vehicle emissions controls, not all such controls, are preempted. Congress intended to preclude regulations that place production mandates on manufacturer, requiring them to build a "third vehicle," something the Fleet Rules do not do.

Finally, the Fleet Rules do not stand as an obstacle to the fulfillment of any purpose of Congress in the Clean Air Act. To the contrary, they stand as a type of market-based regulation that advances Congress's purposes of: 1) promoting clean air; 2) allowing States the maximum flexibility to adopt regulations that will meet the federal air quality standards; 3) allowing States and localities to serve as emissions control laboratories for the nation (especially for motor vehicle controls); and 4) preventing manufacturers from being required to produce more than two versions of any vehicle. The Fleet Rules are valid and not preempted.

Technological controls on cars, trucks, and buses are being pushed to the limits that engineering can achieve, and still the air that millions of *amici* States' residents breathe poses a serious risk of respiratory illness, even cancer. *Amici* States respectfully request that the Court recognize Congress's intent to allow States to use the

fullest legal range of tools to attack the critical problem of air pollution, to protect the health and well-being of millions of their residents.

ARGUMENT

I. THE FLEET RULES ARE NOT PREEMPTED, BOTH BECAUSE THEY ARE REGULATIONS OPERATING WITHIN AN AREA TRADITIONALLY REGULATED BY STATES AND LOCALITIES, AND BECAUSE THEY ADVANCE THE PURPOSES OF THE CLEAN AIR ACT TO IMPROVE AIR QUALITY THROUGH COOPERATIVE FEDERALISM

Petitioners ask the Court to hold, in effect, that as a matter of law, the Act, 42 U.S.C. section 7401 *et seq.*, guarantees to manufacturers a right to sell from the bottom, an absolute right to sell the dirtiest of their new certified trucks and buses in all parts of all States, to all customers, free of any local limitations related to air quality. They further seek a ruling that, as a matter of law, Congress disabled all local agencies, no matter how carefully crafted the regulations or how extreme the air pollution problem, from requiring that fleets be directed to buy from among the cleaner new trucks and buses that are otherwise certified, instead of from the dirtiest. *Amici* States believe that the Clean Air Act grants petitioners no such right.

A. Under Generally Applicable Preemption Principles, the Fleet Rules Are Presumed to be Valid and Not Preempted.

1. Petitioners here argue express preemption of the Fleet Rules, citing Section 209(a) of the Clean Air Act, 42 U.S.C. § 7543(a):

> No State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part. No State shall require certification, inspection, or any other approval relating to the control of emissions from any new motor vehicle or new motor vehicle engine as condition precedent to the initial retail sale, titling (if any), or registration of such motor vehicle, motor vehicle engine, or equipment.

In a case of express preemption, the Court has said that its task is to "'identify the domain expressly preempted' by that language." *Medtronic v. Lohr,* 518 U.S. 470, 484 (1995) (quoting *Cipollone v. Liggett Group*, 505 U.S. at 517 (1992)). The intent of Congress is the touchstone of all preemption analysis. *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963).

2. The Fleet Rules come to this Court with the strong presumption that they are valid and not preempted. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) holds that the Court "start[s] with the presumption that the historic police powers of the States were not to be superseded by [a federal statute] unless that was the clear and manifest purpose of Congress." *Id.* See, also, *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981) ("Consideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state laws.") The same presumption applies to local laws and regulations. *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 605 (1991).

The presumption against preemption of state and local police power measures is rooted in principles of federalism. *Medtronic v. Lohr*, 518 U.S. 470, 485 (1996). At least some measure of a presumption exists "in all preemption cases." *Id.* This Court has observed that the courts should be slow to find federal preemption, "[f]or the State is powerless to remove the ill effects of our decision, while the federal government, which has the ultimate power, remains free to remove the burden." *Penn Dairies v. Milk Control Comm'n*, 318 U.S. 261, 275 (1943). The presumption against preemption applies not only to the initial determination of preemption, but also to the scope of any preemption that is found. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 518.

The Fleet Rules being challenged are "designed to foster public health," an area that falls within the police power, *Huron Portland Cement Co.* v. *City of Detroit*, 362 U.S. 440, 442 (1960), and as such are presumed not to be preempted unless Congress has stated a clear intent to do so. *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 715-718 (1985).

And, as the Court held in *Pharmaceutical Research, et al. v. Walsh*, __ U.S. ___, 123 S.Ct. 1855, 1869 (2003) (internal citation omitted):

> The presumption against federal pre-emption of a State statute designed to foster public health has special force when it appears . . . that the two governments are pursuing common purposes.

See also, *New York State Dept. of Social Servs. v. Dublino*, 413 U.S. 405, 421 (1973).[4] Here, the federal and the local governments are pursuing common purposes, namely clean air and protection of public health.

B. The Clean Air Act Gives States a Primary Role in Controlling Motor Vehicle Emissions.

The analysis begins with the actual text of the statute, *Gade v. National Solid Wastes Management Assn.*, 505 U.S. 88, 111 (1992) (Kennedy, J., concurring in part and concurring in judgment), but it does not end there. The Court also "look[s] to the provisions of the whole law and to its object and policy." *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51 (1987). Where there is any ambiguity in the text, the Court may examine the legislative history of the statute to determine the intent of Congress. See, *e.g.*, *Medtronic*, 518 U.S. at 490 (emphasis added) ("An examination of the basic purpose of the legislation, *as well as its history* entirely supports our rejection of Medtronic's extreme position.").

Far from creating a monolith of federal preemption, the Act has from the very first authorized and encouraged a state program for control of motor vehicle emissions, a

[4] The Clean Air Act's programs, like the Aid to Families with Dependent Children program addressed in *Dublino*, are intensely complex, and form a mixture of very precise Congressional directives *and* of broad grants of authority and regulatory mandates to the States. *Dublino* has special force here, holding that the complexity of a federal statute should not be regarded by itself as proof of Congressional intent to preempt state law. *Dublino*, 413 U.S. at 415.

state program that stands alongside but operates largely independent of the federal program.

1. *Vehicle emission control is an area of traditional state regulation.* States regulated air pollutant emissions,[5] and vehicle pollutant emissions,[6] well before the federal government did. California, in particular, has regulated motor vehicle emissions continuously for as long as there have been motor vehicle emissions control regulations in this country, years before the federal government entered this regulatory area. In 1960, California passed the Motor Vehicle Control Act,[7] and created the Motor Vehicle Pollution Control Board to set emissions limits and certify emissions control devices for motor vehicles.[8] By 1967, California had already required specific emissions control devices on cars registered in California.[9] Seven other

[5] The federal Department of Health, Education, and Welfare reported in 1963 that forty States regulated air pollution at that time. U.S. Department of Health, Education, and Welfare, A Digest of State Air Pollution Laws (Public Health Service) 1963.

[6] A. Reitze, "Overview and Critique: A Century of Air Pollution Control Law: What's Worked; What's Failed; What Might Work" 21 Envtl. L. (1991) 1549, 1570-81.

[7] Cal. Health and Saf. Code sections 24378-24398, repealed Stats 1967, chapter 1545, § 4.

[8] Brestel, *Note: The California Motor Vehicle Pollution Control Law* (1962) 50 California Law Review, 121, 122.

[9] Cal. Health and Safety Code, Stats 1967, chapter 1545, § 5, requiring "[e]very 1963 or later motor vehicle subject to registration" in California to have a CARB-certified device to control crankcase emissions, and "[e]very 1966 or later motor vehicle subject to registration" in California to have CARB-certified devices for both crankcase and exhaust emissions control.

States and the District of Columbia also regulated motor vehicle emissions prior to the federal government.[10]

Not until 1965 did Congress enact the federal Motor Vehicle Air Pollution Control Act. Not until 1967 did Congress even purport to preempt state control of vehicle emissions, and then it expressly exempted the state program that California was already enforcing.[11]

Rather than being an area where the federal interest has always predominated, control of motor vehicle emissions started at the state and local level, with the federal government never quite catching up.

2. *From the beginning, Congress enacted only a partial federal preemption of vehicle emissions control.* Petitioners portray Section 209(a) of the Act, 42 U.S.C. § 7543(a), as completely preempting state and local control of vehicle emissions. In fact, Section 209(a) preempts only the setting of standards that impose production mandates on manufacturers, not all controls on motor vehicle emissions. And even as to production mandates, the preemption is only a partial one. Congress established a waiver provision in Section 209(b), 42 U.S.C. § 7543(b), that is extraordinary, and may be unique in federal law. Section 209(b) gives explicit authority for a state vehicle emissions

[10] U.S. Department of Health, Education, and Welfare, A Digest of State Air Pollution Laws (Public Health Service) 1963, at 12, 39, 45, 92, 94, 114, 124, 139, 161.

[11] Pollution and Policy, a Case Essay on California and Federal Experience with Motor Vehicle Air Pollution, J. Krier and E. Ursin (1977), cited by Petitioners, states that "[t]he almost empty history of federal air pollution control developments prior to mid-twentieth century stands in contrast to federal actions with respect to water pollution." *Id.* at 47.

control program in California that sits alongside, but is largely independent of, the federal program.

Congress granted this state program considerable autonomy, presumptively granting a waiver of federal preemption to California, unless the U.S. EPA finds that California is wrong in its technical judgement of need or technological feasibility.[12] The U.S. EPA's review of California's judgement about need and feasibility is narrow.[13] U.S. EPA routinely approves waivers even when it disagrees with California's policy choices, carrying out the dictate of Congress in Section 209(b).[14] Under the 1977 amendments to the Act, Congress allowed California to adopt a package of emissions standards, even if individual standards within that package were *less* stringent than their federal counterparts. *Motor and Manufacturers Association v. Environmental Protection Agency*, 627 F.2d 1095, 1110-11 (D.C. Cir. 1979). The Clean Air Act has never contained a complete federal preemption of motor vehicle control, but has allowed a nearly autonomous state program from the beginning.

[12] A House version of the waiver provision proposed by Representative Dingell, would have required California to demonstrate to the U.S. EPA Administrator's satisfaction that California had an extraordinary need for its own standards, and would have left the decision, and any exercise of discretion, in federal hands. H.R. Rep. No. 90-728, 22. That version did not pass.

[13] 49 Fed. Reg. 18887 (May 3, 1984) ("Congress intended that the standard of EPA review of the State decision be a narrow one.") See, also, 40 Fed. Reg. 23102, 23103 (May 28, 1975). See, also, 40 C.F.R. Part 85, § 85.1606, 46 Fed. Reg. 62366 (Dec. 23, 1981), 49 Fed. Reg. 18887 (May 3, 1984), 59 Fed. Reg. 48625 (September 22, 1994).

[14] See, *e.g.*, 36 Fed. Reg. 17458, at 17459 (August 31, 1971), 40 Fed. Reg. 23102, 23104 (May 28, 1975).

3. *In 1977, Congress expanded the independent state vehicle emissions control program.* In the 1977 amendments to the Act, Congress further expanded explicit authority for the state motor vehicle emissions standard program by enacting Section 177 of the Act, 42 U.S.C. § 7507, which allows other States to adopt California's vehicle emissions standards. These States do not need to demonstrate an extraordinary need for more protective standards than the federal ones, as California must do, nor do they need an explicit waiver of federal preemption. If an individual State has State Implementation Plan ("SIP") provisions that call for the vehicle emissions reductions that California's standards provide, it is that State's choice whether to adopt those standards; U.S. EPA has no power to grant or deny a waiver under Section 177. The State need only notify the U.S. EPA of its decision to opt into the California standards.[15]

Further, the Act places no cap on the number of qualifying States that may adopt California's vehicle

[15] As the U.S. EPA has stated in the context of offroad vehicle emissions standards:

> [T]he Act neither requires that States obtain EPA authorization to impose California's nonroad engine standards nor authorizes the Agency to require that States do so. . . . [A]ny State which has plan provisions approved under part D of Title I of the Act (generally States within ozone nonattainment areas) may adopt and enforce, "after notice to the Administrator," California standards. Language requiring that other State request and receive authorization from EPA is noticeably absent. Indeed, the statutory text reads as authorizing States to adopt California standards on their own volition.

59 Fed. Reg. 36969, 36983 (July 20, 1994).

emissions control program; many States have adopted California's vehicle emissions control package, including *amici* States Maine, Massachusetts, New York and Vermont, and more may do so as the need arises. While the Fleet Rules at issue here are not state rules, nor subject to a Section 209(b) waiver, the actual provisions and legislative history of the Act, and several decades of regulatory interpretation of the Act by U.S. EPA, all demonstrate that federal preemption of vehicle emissions has always been limited in scope, and has become steadily more limited over the years.

4. *The California/multi-state program advances cooperative federalism by allowing States and localities to act as laboratories for the nation, as Respondent SCAQMD has done here.* A narrow reading of Section 209(a) reflects and advances the structure and purpose of the Clean Air Act as a "bold experiment in cooperative federalism." *Connecticut v. Environmental Protection Agency*, 696 F.2d 147, 151 (2d Cir. 1982). Courts have recognized that the Act is "an intergovernmental partnership to regulate air quality," *Michigan v. Environmental Protection Agency*, 268 F.3d 1075, 1078 (D.C. Cir. 2001), with the U.S. EPA setting national air quality standards and providing technical and financial support and back-up enforcement, but with primary responsibility for meeting the national standards imposed by Congress upon the States. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 845-846 (1984). Given the enormity and importance of the task, and the severity of the consequences of

failure,[16] the Act provides that the States – who have the ultimate responsibility for cleaning the air – have the primary choice of what control measures to use. *Union Electric Co. v. Environmental Protection Agency*, 427 U.S. 246, 250 (1976). In setting up this structure of cooperative federalism, Congress relied upon one of the great strengths of federalism: the ability of States to serve as laboratories for the nation, trying experiments in regulation that may, or may not, serve as models for the other States or the nation as a whole. *New State Ice Co. v. Liebman*, 285 U.S. 262, 311 (1932), (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory, and try novel social and economic experiments without risk to the rest of the country.") The multi-state automotive regulatory program, spear-headed by California, has served as just such a laboratory for the nation in vehicle emissions control. As U.S. EPA Administrator Ruckelshaus observed:

> [T]here is a well-established pattern that emission control advances have been phased in through use in California before their use nationwide.

38 Fed. Reg. 10317, 10324 (April 26, 1973.)

In 1981, the National Commission on Air Quality observed that California's standards tend to lead federal standards by two to five years, showing the value of the

[16] Such consequences include withholding of federal highway funds, 42 U.S.C. 7509(b)(1), and direct imposition of federal control plans, 42 U.S.C. 7410(c).

state program to the nation. National Commission on Air Quality, *To Breathe Clean Air*, 197 (1981). The California/multi-state vehicle emissions control program is probably one of the most solid and consistent successes of cooperative federalism, repeatedly forcing and proving new and innovative technology that can be applied nationwide to support increasingly stringent federal vehicle emission standards.[17]

The enactment of Section 177, and its open-ended authorization of the use of California standards by other States, shows that Congress intended this "laboratory" model to continue and expand. The Fleet Rules exemplify one of the main benefits of the California/multi-state program: allowing those States that need greater emissions reductions from automotive sources to obtain them *without* imposing the costs of more stringent vehicle controls on the country as a whole.

C. Section 116 of the Act Expresses Congress's Intent to Limit Federal Preemption and Authorize More Stringent State Controls.

The savings clause contained in Section 116 of the Act, 42 U.S.C. § 7416, also supports the narrowest possible interpretation of the preemptive scope of Section 209(a). That Savings Clause names only three sections of the Act

[17] Respondent SCAQMD has served as the nation's laboratory before, as recognized by U.S. EPA on numerous occasions. 59 Fed. Reg. 23264, 23307 (May 5, 1994) (federal plan for Sacramento and Ventura areas incorporates several controls based on SCAQMD models); 59 Fed. Reg. 48664, 48681-82 (Sept. 22, 1994) (noting SCAQMD's work developing market incentives).

as being preemptive, including Section 209(a). The clause then characterizes these three sections as only "preempting *certain* State regulation of moving sources," not *all* such regulation. 42 U.S.C. § 7416 (emphasis added). The main thrust of Section 116 is that any State or political subdivision of a State retains the right to adopt more stringent standards or control measures than those mandated by Congress.

Also, Section 116 affirmatively declares the right of any "State *or political subdivision thereof*" to adopt more stringent standards and regulations than the federal ones, except for those few federal controls on mobile sources. 42 U.S.C. 7416 (emphasis added). The Act emphasizes at every point the primacy of States and localities in air pollution control.[18] The declaration in Section 116 of States' and localities' retained authority shows a lack of congressional intent to preempt the entire field of mobile source emission control, and an express intent to keep the scope of preemption narrow.

D. The Term "Standards Relating to the Control of Emissions" as Used in Section 209 Refers Only to Numerical Standards, Not Market Controls Such as the Fleet Rules.

Central to petitioners' claim of federal preemption of the Fleet Rules is an overly simplified and overly expanded definition of the words "standards relating to control of emissions" in Section 209(a). Petitioners claim

[18] See, *e.g.*, 42 U.S.C. § 7401(a)(3), where in Congress found "that air pollution [ ] control at its source is the primary responsibility of States and local governments. . . ."

that those words encompass not merely any and all *standards* adopted by States or localities to reduce motor vehicle pollutant emissions, but any and all state or local *regulations* adopted with that intent, including regulations such as the Fleet Rules, which do not, by their own terms, directly apply to manufacturers. The argument should be rejected.

1. *The Words "Relating to" in Section 209(a) Do Not Expand the Scope of The Act's Preemption.* Petitioners and the United States argue that the words "relating to" in Section 209(a) expand the scope of federal preemption to virtually any state or local regulatory measure that affects new motor vehicles and is intended to reduce emissions. The argument should be rejected, and the phrase "relating to" should be construed to draw in only those rules that are inconsistent with Congress's objectives in the Act.

The words "related to" have in the past been interpreted to have a broad meaning, *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383-85 (1992), but in *New York State Conference of Blue Cross & Blue Shield Plans, et al. v. Travelers Insurance Co., et al.*, 514 U.S. 645 (1995) (upholding significant state law surcharges on hospital costs paid by insurers under employment benefit plans), the Court recognized the lack of meaning inherent in such broad construction:

> [O]ne might be excused for wondering, at first blush, whether the words of limitation ("insofar as they . . . relate") do much limiting. If "relate to" were taken to extend to the furthest stretch of its indeterminacy, then for all practical purposes pre-emption would never run its course, for "[r]eally, universally, relations stop nowhere."

Id. at 655. As Justice Scalia noted in another case, "everything is related to everything else." *California Division*

of Labor Standards Enforcement, et al. v. Dillingham Construction, N.A., Inc., et al., 519 U.S. 316, 335 (1997) (Scalia, J., concurring).

In *Travelers*, therefor, the Court determined that it "must go beyond the unhelpful text and the frustrating difficulty of defining its key term, and look instead to the objectives of the [federal] statute as a guide to the scope of the State law the Congress understood would survive." 514 U.S. at 656. The Court also looked to the nature of the effect of the state law on the federal statutory scheme, and found that the state law's "indirect economic effects on the relative costs of various health insurance packages in a given State" did not have a sufficiently direct impact on the federal scheme of uniformity as to require preemption. *Travelers*, 514 U.S. at 661-62. Only significant impacts are preempted. The Court applied this same analysis in its subsequent unanimous opinion in *Dillingham*, focusing on Congress's objectives and whether the challenged state law conflicts with those objectives in any significant way. *Dillingham*, 519 U.S. at 325.

Congress had clear objectives in enacting the Act's motor vehicle emissions control provisions: to clean the air and to reduce vehicle pollutant emissions through an exercise in cooperative federalism in which the U.S. EPA sets the floor of emissions standards; California is allowed to adopt more exacting emissions controls; other States, under Section 177, are allowed to adopt California's standards; and vehicle manufacturers are not required to build more than two versions of any model vehicle. The Fleet Rules conflict with none of these objectives. In fact, they further each.

2. *"Standards," as used in Section 209, means numerical limits on emissions that impose production*

mandates on manufacturers. The term "standard" as used in Title II of the Act is not expressly defined in Section 209, *Motor Vehicle Mfrs. v. NYS Dept. of Conservation*, 17 F.3d 521, 533 (2nd Cir. 1994), or in Title II as a whole. However, for purposes of preemption analysis, this Court may look at both the text and the structure of the Act, and the context of Title II, to determine the meaning Congress intended it to have there. *Gade v. National Solid Wastes Management Assn.*, 505 U.S. 88, 96. *Amici* States believe that the intended meaning of the term "standard relating to control of emissions," as it is used in Section 209, is a requirement that is: (1) imposed directly upon a manufacturer as a condition of certifying its vehicles for sale; and (2) numerical, a specified number of grams of a given pollutant that may be emitted per mile driven or per unit of energy exerted[19], or a concentration in parts per million or other unit of measurement that may be emitted by a vehicle the manufacturer certifies.[20] That is the only meaning that comports with all the Act's provisions.

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[19] Standards for heavy-duty engines are generally expressed in grams per brake-horsepower hour, a standard that measures emissions in proportion to the amount of energy expended by the engine. See, *e.g.*, 40 C.F.R. Part 86, § 86.007-11. A few emissions standards are expressed by other numeric means, such as a standard for evaporative emissions, which may be expressed as a per-test numeric limit. See, *e.g.*, 40 C.F.R. Part 86, § 86.008-10.(b).

[20] Such a numerical standard may also be expressed in terms of a fleet average, or a mandate that a certain percentage of the fleet meet specified emissions levels (such as a requirement that a specified percentage be zero emission vehicles). This is also a "standard," imposed directly on the manufacturer and directly linked to a specific emissions limit. Congress's very deliberate care how and when it used the term "standard" further shows its lack of desire to preempt the entire field of vehicle emissions control.

Congress used the term "standards," as applied to motor vehicle emissions, throughout Section 202 of the Act, and its use there shows the meaning Congress ascribed to it. Section 202 authorizes and directs the Administrator of U.S. EPA to adopt "standards applicable to the emission of any air pollutant" from motor vehicles. These "standards" are numerical standards that prescribe the maximum level of pollutants that new motor vehicles may emit, and that manufacturers must meet in their vehicles in order to certify the vehicles as legal for sale. "Standards" focus and depend on technology and hardware, as shown by the elaborate detail in Section 202 regarding the requirements for availability, lead time, and cost of technology to meet the federal standards. See, *e.g.*, 42 U.S.C. §§ 7521(a)(1), 7521(a)(2), 7521(a)(3). Section 202 specifically refers to standards "which reflect the greatest degree of emission reduction achievable *through the application of technology* which the Administrator determines will be available for the model year to which such standards apply. . . ." 42 U.S.C. § 7521(a)(3)(A)(i) (emphasis added).[21]

2. *Congress's intent can also be seen in subdivision (b) of Section 209, which allows California to obtain a waiver of federal preemption and set its own vehicle*

[21] See Section 202(b)(1)(A) (emissions standards for light-duty vehicles, expressed in grams per mile); Section 202(g)(1) and (2) (emissions standards for light-duty trucks, expressed in grams per mile); Section 202(h) (emissions standards for later light-duty trucks, expressed in grams per mile); Section 202(j)(1) and (2) (cold carbon monoxide emissions standard, expressed in grams per mile, with phase-in schedule); Section 202[n] (emissions standards for post-1990 buses, expressed in grams per brake horsepower hour); Section 207(c)(4) (emissions standards for light-duty trucks, expressed in grams per mile).

emissions standards. To qualify for a waiver of preemption, California must show, *inter alia*, that its proposed standards meet the requirements set in Section 202 for federal emission standards (that is, that the requisite technology will be available with sufficient lead time). 42 U.S.C. § 7543(b)(1)(C). Congress thus intended the waived Section 209(b) "standards" to be the same type of standards as the Section 202 standards: numerical, technology- and hardware-based production mandates imposed directly on manufacturers. There is no other logical reading of Section 209(b)(1)(C).

U.S. EPA has consistently applied this definition in its decisions granting waivers of Section 209(a) to California,[22] and the District of Columbia Circuit has upheld that interpretation. In *Motor and Equipment Mfrs. Ass'n, Inc. v. Environmental Protection Agency*, 627 F.2d 1095, 1111-12 (D.C. Cir. 1979), *cert. den.*, 446 U.S. 592 (1980), the court upheld the position of the U.S. EPA Administrator in a contested waiver decision. It held that, as used in Section 209, "the word 'standards' connotes a *numerical value* setting the *quantitative level* of permitted emissions of pollutants by a new motor vehicle" (emphasis added), rejecting the view "that 'standards' means *any* regulation relating to motor vehicles." *Motor and Equipment Mfrs.*,

[22] See, *e.g.*, 36 Fed. Reg. 17458 (August 31, 1971), 42 Fed. Reg. 3192, 3193 (January 17, 1977), and 43 Fed. Reg. 9344, 9346 (March 7, 1978), each setting out difference between a standard (numerical value) and enforcement procedures (tests to determine whether numerical standard has been met); and 41 Fed. Reg. 44209, 44212 (October 7, 1976), explaining difference between a standard (numerical value) and the length of time a vehicle must meet that standard.

627 F.2d 1112 (emphasis added). The court went on to hold:

> The legislative history also indicates that Congress intended the word "standards" in section 209 to mean quantitative levels of emissions rather than regulations involving certification or in-use maintenance restrictions. The Senate Report on the Air Quality Act of 1967, discussing the preemption provision, mentions "standards" for hydrocarbons, nitrogen oxides, and carbon monoxide in obvious reference to the numerical limitations on those pollutants. S.Rep.No. 403, 90th Cong., 1st Sess. 32 (1967.)

Id.

The reasoning of the *Motor and Equipment Mfrs.* court applies here equally: not every regulation relating to vehicle emissions is preempted by Section 209, only regulations directly setting numerical emissions limits that manufacturers must meet.

E. Section 209(a)'s Preemption Was Intended to Cover Only Regulations That Control Emissions *and* Mandate That Manufacturers Produce Vehicles to Meet Them; It Embodies the Two-Car Compromise That Balances Clean Air with Manufacturers' Needs.

That the Fleet Rules are not "standards" for purposes of Section 209(a)'s federal preemption can also be seen by the fact that no manufacturer is legally required to produce vehicles to meet the Fleet Rules, in order to offer its vehicles for sale in California. The Fleet Rules contain no production requirement for manufacturers, just as they

contain no numerical emissions limitation, and no certification requirement other than the California Air Resources Board certification that the manufacturer must obtain in order to offer the vehicle for sale in California.

The Fleet Rules do not require any manufacturer to produce any vehicle that it does not choose to produce and certify for California. On the contrary, the Fleet Rules require covered fleet owners to buy the specified clean-fuel vehicles *only* if they are already certified for sale in California. If no manufacturer chooses to make and certify in California a vehicle that meets Fleet Rule requirements, the fleet owner may buy any California-certified vehicle, even if it would otherwise violate the Fleet Rules.

This is the point upon which *American Auto Mfrs. Ass'n v. Cahill*, 152 F.3d 196 (2d Cir. 1998) and *International Auto Mfrs. v. Commissioner*, 208 F.3d 1 (1st Cir. 2000), cited by Petitioners, Pet. Brf. at 23, 42, are inapposite. Those cases held that Section 177 States (States that have adopted California's standards) could not *mandate* the production, certification, and offering for sale by manufacturers of certain numbers or percentages of zero-emission vehicles ("ZEVs"), which were expected to be electric cars, in those States. *Cahill*, 152 F.3d at 200 (ZEV sales requirement mandated a specified percentage of cars sold must be ZEVs); *International Auto*, 208 F.3d at 6 (same). Here, there is no mandate on the manufacturers to produce vehicles that comply with the Fleet Rules. The manufacturers may wish, as a business decision, to produce such vehicles in order to better compete in the local and specialized market of the specified fleet types (buses, street sweepers, airport shuttles, etc.) whose owners are covered by the Fleet Rules. However, as distinguished from the facts in *Cahill*, the manufacturers will be allowed

to offer their general production lines for sale in California without producing any vehicles that satisfy the Fleet Rules. Indeed, should all manufacturers independently decide[23] not to produce vehicles conforming to Fleet Rule requirements, then the Fleet Rules will be without effect, and fleet owners will be able to buy any California certified vehicle that they wish, pursuant to the "escape clause" in the Rules.

In Section 209(a), Congress was not concerned with restrictions on customers in their purchase of specialized product lines, but with mandates on vehicle manufacturers to produce more than two versions of any given line of vehicles. Although Section 177 does not limit Section 209, it indicates the intent of Congress, providing in pertinent part:

> Nothing in this section or in subchapter II of this chapter shall be construed as authorizing any such State [i.e., any non-California State that adopts California's emissions standards] to. . . . take any action of any kind to create, or have the effect of creating, a motor vehicle or motor vehicle engine different than a motor vehicle or motor vehicle engine certified in California under California standards (a "third vehicle") or otherwise create such a "third vehicle."

Lower courts have recognized this "identicality," or no "third vehicle," requirement as at the heart of Section 177. *Motor Vehicle Mfrs. v. NYS Dept. of Env. Cons.*, 17 F.3d 521, 531-32.

[23] We posit no mutual agreement among manufacturers to do so, since such an agreement would raise anti-trust concerns.

The legislative history of Section 209 also shows that Congress intended the Section 209 preemption to prevent manufacturers from being required to design and build more than two versions of each vehicle.[24] While Section 209 was under consideration, manufacturers demanded that they be required to make only one version of each model vehicle; California demanded that it be allowed to continue its long history of setting independent standards that would require a second, less polluting version. In Section 209, Congress struck the two-car compromise. California could adopt emissions standards that required manufacturers to make a second version of affected vehicles, while the federal version would be made for the other 49 States. The manufactures would not be required to build more than two versions of any vehicle. Congress then lifted the 49-State preemption after only a few years, allowing other States to adopt California's standards, but it required them to adopt California's standards in total, so that the two-car compromise was maintained.

The Fleet Rules in no way affect or threaten the two-vehicle compromise, because they do not require the production or sale of a third vehicle. The Fleet Rules not only do not require manufacturers to build and certify a third vehicle, they virtually forbid it, since they allow a covered fleet owner to choose solely from among California-certified vehicles. No third vehicle can be required,

[24] Respondents' briefs thoroughly cover the legislative history behind the origin of Section 209(a), and the balancing done by Congress of California's history and extreme vehicle air pollution problem against the burden on manufacturers of making more than one version of its cars and trucks. S. Rpt. No. 403, 90th Cong., 1st Sess., 155 (1967).

thereby respecting the purposes of Congress in enacting Section 209.

F. Textual Analysis of the Act Shows That Congress Did Not Intend Section 209(a) to Preempt All State or Local Regulations Intended to Reduce Motor Vehicle Emissions.

Reading a statute to render a portion of it surplusage is disfavored under standard canons of statutory construction, since the terms of a statute should be read so as to give each of them meaning. *Moskal v. United States*, 498 U.S. 103, 109-110 (1990). Petitioners' reading of "standards relating to the control of emissions" would render surplusage several provisions of the Act that expressly *require* the States to carry out regulatory programs designed to lower vehicle emissions.

1. In the 1990 amendments to the Act, Congress recognized that the problem of urban air pollution is far more intractable than first supposed, and it enacted long and extraordinarily detailed provisions that States and localities are required to enact in nonattainment areas. 74 U.S.C. § 7502 *et seq.* Examples include transportation control measures to reduce vehicle miles traveled, including driving restrictions (42 U.S.C. §§ 7511a(c)(5); 7511a(d)(1)[25]), possible economic incentive programs (42 U.S.C. § 7511a(g)(4)), and the mandatory fleet rule provisions of Section 246, which require the use of clean-fuel

[25] In States having "extreme" ozone problems, even more severe transportation and traffic controls must be considered. 42 U.S.C. § 7511a(e)(4).

vehicles in specified fleets in ozone nonattainment areas. Petitioners' construction of the Act would render these provisions federally preempted. None of these provisions contains a clause stating that they apply "notwithstanding" Section 209(a), nor does Section 209(a) have such a *non obstante* clause as to them. To read the Act as both preempting and mandating the same regulations produces absurd results that Congress could not have intended. Such a reading should be avoided. *Public Citizen v. Department of Justice*, 491 U.S. 440, 453-455 (1988).

2. Congress has also stated that regulation of fuel quality affects vehicle emissions. S. Rpt. No. 101-228, 101st Con., 2d Sess., 1990, p.116; *Motor Vehicle Mfrs. v. NYS Dept. of Env. Cons.*, 17 F.3d 521, 532. Fuel quality affects emissions when a model goes through certification testing, and from the time a new vehicle is first fueled, even before it leaves the dealer's lot. Accordingly, the Act provides for controls on fuel content as a means of vehicle emissions control, including a provision for limited federal preemption of fuel content, in Section 211(c) of the Act. 42 U.S.C. § 7545(c). These controls, and the limited federal preemption, are entirely separate from the preemption in Section 209(a). *Motor Vehicle Mfrs.*, 17 F.3d at 532.

To read Section 209(a) as preempting all state or local regulatory measures that are intended to influence or reduce emissions would be to render nugatory the fuel content requirements of the Act in Section 211(c)(4). Section 211(c)(4)(A) forbids any "State (or political subdivision thereof) from setting fuel standards for purposes of motor vehicle emission control" if U.S. EPA has enacted or forbidden specified fuel content regulations itself. Section 211(c) allows that limited preemption, where it applies, to be waived for States other than California, Section

211(c)(4)(C), 42 U.S.C. § 7545(c)(4)(C), and exempts California from federal preemption altogether. 42 U.S.C. § 7545(c)(4)(B).

Although Section 211(c) expressly preempts state and local regulation of fuel and fuel additives for purposes of vehicle emissions control (where U.S. EPA has enacted the requisite fuel content prescriptions or proscriptions), it does *not* state that it applies "notwithstanding" Section 209. However, if the Section 209(a) preemption really covered *all* state or local regulatory measures intended to reduce or control vehicle emissions, there would be no need for Section 211(c)'s preemption of control of any fuels and fuel additives intended to reduce or control these same vehicle emissions; Section 209(a)'s supposedly blanket preemption would already have done so. The broad reading of Section 209(a) urged by petitioners and their *amici* would thus render the detailed provisions of Section 211(c)(4) surplusage.

Since neither Section states that it operates "notwithstanding" the other, Congress obviously intended both Sections to be given full effect.[26] Reading these two Sections of the Act together shows that Congress did not intend to preempt *all* state and local regulations that

[26] Congress *did* use the phrase "[n]otwithstanding Section [209(a)] of this title" in Section 177, when it lifted the federal preemption of Section 209(a) for States that adopt the California standards as their own. Where Congress believed that different sections of the Act overlapped, it was perfectly able to indicate which should trump the other. It did not say so in Section 211(c), showing that Congress itself did not consider the preemptive reach of Section 209(a) to be anything like the broad sweep claimed here by petitioners and their *amici*.

affect new motor vehicles and are intended to reduce emissions.

G. The Act Does Not Preempt Controls on Vehicle Purchasers.

Petitioners believe that Section 209(a) can be read as preempting limitations on the buyers of vehicles, rather than preempting regulations that apply solely to the manufacturers. *Amici* States disagree. The Clean Air Act in Title II does not directly speak to controls on purchasers of vehicles, either positively or negatively. The text and legislative history of Section 209(a) are concerned with the competing interests of States and vehicle manufacturers, and do not directly address consumers. Petitioners can cite only one passing reference to purchaser of motor vehicles in the legislative history[27] and even that is ambiguous.

Congress has not spoken explicitly to regulations that target the demand side of vehicle emissions control, rather than the closely regulated supply side.[28] Certainly, Congress has not expressed a "clear and manifest" intent to preempt such programs. *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 715-716. Given this absence of congressional direction on purchaser controls, *amici* States believe that the *Rice* presumption

[27] Pet. Brf., at 38-39.

[28] The exception is the provision at Section 182(g)(4) of the Act, 42 U.S.C. § 7511a(g)(4), which allows States to elect to use an "economic incentives" program, which may include mobile sources, to meet certain emissions reduction targets. Again, Congress did not provide that States may pursue such programs "notwithstanding" Section 209, indicating that Congress did not view economic incentive programs as being preempted.

against preemption should control here, and the Fleet Rules upheld in the absence of any affirmative action by Congress to preempt such regulations.

CONCLUSION

For all the reasons set forth above, *amici* States ask that the Court affirm the decision of the Ninth Circuit that the Fleet Rules are not federally preempted.

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